STATE OF MAINE
PUBLIC UTILITIES COMMISSION
18 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0018

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COMMISSIONERS

October 18, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Enclosed for filing is an original and ten (10) copies of the Joint Petition for Reconsideration by the States of Maine, Vermont, Virginia, Alabama, District of Columbia, Maryland and Montana.

Also enclosed is an original and ten (10) copies of the Motion to Leave to File the Petition for Reconsideration from those states who did not file comments in this proceeding. If the Motion is not granted, please file these comments on behalf of the states of Maine, Vermont and Virginia who did file comments in this proceeding.

Please stamp one copy and return to us in the enclosed stamped envelope.

If you have any questions or require additional information, please feel free to call me.

Sincerely,

Joel B. Shifman, Esquire

JBS/nlp
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-128
Pay Telephone Reclassification	)	
and Compensation Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
Policies and Rules Concerning	)	CC Docket No. 91-35
Operator Service Access and	)	
Pay Telephone Compensation	)	
	)	
Petition of the Public Telephone	)	
Council to Treat Bell Operating Company	)	
Payphones as Customer Premises	)	
Equipment	)	**JOINT PETITION FOR**
	)	**RECONSIDERATION**
Petition of Oncor Communications	)	**BY THE STATES OF**
Requesting Compensation for	)	**MAINE, VERMONT, VIRGINIA**
Competitive Payphone Premises	)	**ALABAMA**
Owners and Presubscribed Operator	)	**DISTRICT OF COLUMBIA**
Services Providers	)	**MARYLAND**
	)	**MONTANA**
Petition of the California Payphone	)	
Association to Amend and Clarify	)	
Section 68.2(a) of the	)	
Commission's Rules	)	
	)	
Amendment of Section 69.2(m)	)	
and (ee) of the Commission's Rules	)	
to Include Independent Public	)	
Payphones Within the "Public	)	
Telephone" Exemption from End User	)	
Common Line Access Charges	)	

The state utility commissions named below (hereinafter "the state commissions") move for reconsideration of the Report and Order issued by the Federal Communications Commission ("Commission") on September 20, 1996.

The state commissions requesting reconsideration are statutorily responsible for establishing just and reasonable rates, charges, practices, and service quality standards for public utilities within their jurisdictions. They therefore are "state commission(s)" within the meaning of the Telecommunications Act of 1996.[1] Pursuant to the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 106, 1.40 and 1.419 (1995), the states requesting reconsideration are: Alabama, District of Columbia, Maine, Maryland, Montanta, Vermont, Virginia. Maine, Vermont and Virginia filed comments in this rulemaking. Alabama, the District of Columbia, Maryland and Montana did not file comments but join this Motion if their Motion for leave to file Petition for Reconsideration, filed on this date, is granted.

The state commissions believe that the Commission (1) has improperly and unlawfully asserted jurisdiction over state end-user coin rates, or (2) even if it does have the legal authority to regulate (and deregulate) the local intrastate rates for coin calls, it has not and, on the basis of the present record, cannot make the findings that are necessary to order deregulation.

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[1] *E.g.*, 1996 Act, Sec. 101(a), §§ 251(e), 252(b).

I. LEGAL AUTHORITY

The Report and Order issued by the Commission preempts state regulation of local intrastate payphone service, and deregulates local coin rates. Deregulation is not supported by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). In the first instance, states retain jurisdiction under section 2(b) of the Act to establish intrastate rates. 47 U.S.C. § 152(b). Moreover, nothing in section 276, which directs the Commission to eliminate subsidization of Bell Operating Company ("BOC") payphones from monopoly rates, provides the Commission with the authority to establish local coin rates or to preempt state ratemaking.

Section 2(b) of the Act makes clear that absent an express grant of authority, states retain intrastate ratemaking authority. That section provides that "nothing in this Act shall be construed to apply to or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier . . . ." The coin rate for local telephone calls clearly is an intrastate communications service left to the states to regulate. The Commission's preemption of states' authority to regulate these rates conflicts directly with section 152(b). *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986). The Supreme Court determined that in order to overcome subsection 2(b)'s limits on the FCC's jurisdiction with respect to intrastate

communications service, Congress must "unambiguously" or "straightforwardly" either modify subsection 2(b) or grant the FCC additional authority. *Id.* at 377.

Nothing in section 276 of the Act provides the Commission with the authority to preempt state regulation of coin rates. The Commission, in implementing section 276, is required to ensure fair compensation for calls and to eliminate subsidies from local exchange service, thus promoting competition among payphone providers. Section 276(b). The Commission's authority is limited to achieving these objectives. In each instance, the Commission can establish rules that achieve the results contemplated by section 276 without preempting state regulation of local coin rates. The present rules therefore are overly broad, preempting state regulation where such preemption is neither explicitly required nor implied by the Act.

The states' interests in preserving their ability to set the local coin rate is far from academic. Some states set local coin rates and local coin calling areas that are different from other local calling areas to solve state-specific situations.[2]

The Telecommunications Act does not direct or permit the Commission to set or regulate (or deregulate) intrastate retail coin rates for local service. 47 U.S.C. § 276 (enacted by the Telecommunications Act) states that the Commission shall:

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[2]Some states have a special "local" coin rate to allow students to call home from a consolidated school district located in several calling areas. Other states use local coin calling as a means of providing universal service to those who do not have telephones.

prescribe regulations that --

> (A) establish a per call *compensation plan* to ensure that all payphone service providers are fairly *compensated* for each and every intrastate and interstate call using their payphone . . . ;
>
> (B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a *compensation plan* as specified in subparagraph (A); . . . .

(emphasis added). "Compensation" and "compensation plan" must be understood as terms of art that refer only to compensation between owners of payphones and carriers and not to the "compensation" paid by end-user consumers who deposit coins in payphones for the purpose of making local calls. Section 276 must be understood in effect as amendments to the earlier-enacted section 47 U.S.C. § 226, enacted as the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), and to the flat-rate compensation plan for "dial-around" calls that the Commission ordered pursuant to TOCSIA.

Subsection (e)(2) (entitled "Compensation") of section 226 states:

> The Commission shall consider the need to prescribe *compensation (other than advance payment by consumers)* for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones.

(emphasis added).

In 1992, the Commission promulgated 47 C.F.R. § 64.1301, which ordered a compensation plan that provided a flat monthly compensation of $6 per payphone.[3] In 1996, Congress apparently was dissatisfied with the flat monthly charges, and in section 276 ordered the Commission instead to adopt a per-call compensation plan, specifically, compensation "for each and every completed intrastate and interstate call . . . ." 47 U.S.C. § 276(b)(1)(A). In section 276, Congress expanded the scope of calls subject to "compensation" to all intrastate and interstate calls rather than only to dial-around calls, as had been provided in section 226. Nevertheless, for the dial-around calls covered by both sections, Congress specifically ordered replacement of the very "compensation" plan that, under TOCSIA, it had authorized the Commission in its discretion to prescribe.

Most importantly, in the earlier section, "compensation" was specifically defined as payments "other than advance payment by consumers." The existing compensation schemes all involve compensation by carriers to the owner of the payphone instrument. The per call compensation plans envisioned by section 276(b)(1)(A) are those that will replace (1) the existing compensation arrangements under Part 69 that require a portion of the Carrier Common Line Charge paid by carriers to cover the cost of local exchange carrier (LEC) provided payphones, (2) the existing contracts between private payphone providers and

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[3] *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, CC Docket No. 91-35, 7 F.C.C. Rcd. 3251 (May 8, 1992).

inter- and intrastate carriers, and (3) the flat $6.00 rate paid by *interexchange* carriers to payphone owners to compensate them for "dial-around" traffic.

Section 276(b)(1)(A) requires the Commission to establish per call compensation plans. That obligation, however, does not translate into authority to prescribe a retail local coin rate or to prohibit states from regulating that rate. The retail coin rate covers not only a portion of the cost of the payphone instrument (arguably the "compensation" amount) but also the network costs the coin phone provider must pay to the LEC to terminate the local call.

Nothing in section 276 provides a legal or public policy basis to redefine the term compensation to include retail coin rates.[4] The Commission has separate, preexisting, authority to regulate coin rates for interstate toll calls. The states have existing authority to regulate intrastate local coin rates. For local sent paid coin traffic there is no need or authority to establish a "compensation" plan. Those coin revenues are paid directly to the payphone owner, and there is no compensation by carriers. Accordingly, although the Commission under section 276(b)(1)(B) must ensure that the local coin rate is not subsidized by local exchange or exchange access revenues, under section 276(b)(1)(A) it does not have any further authority over local coin rates.

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[4]At Paragraph 58, the Commission suggests that subsidized rates may not fairly compensate the payphone owner for the call. However, the solution to this problem is to ensure that local coin rates are subsidy free and not to bootstrap the Commission's authority under section 276(b)(1)(A) into actually establishing a "compensatory" retail local coin rate authority.

If Congress had intended that the FCC's rulemaking authority under section 276(b)(1)(A) should extend to coin rates, it would have referred to "rates" or "charges" as well as to compensation. Within section 226 (TOCSIA), Congress carefully distinguished between "compensation" and "rates and charges." In subsections (e)(2) (quoted earlier) and in subsection (b)(1)(E),[5] "compensation" is used to describe compensation at the supplier level. However, other provisions of section 226 refer to "rates or charges." *See* subsections (b)(1)(C), (c) and (h). It is clear from the contexts of each of those references that "rates" or "charges" are what must be disclosed to and paid by "consumers." *See*, especially, section 226(b)(1)(C). Under section 226(a)(4), a "'consumer' means a person initiating any interstate telephone call using operator services."

Elsewhere in the Communications Act, both in 1934 and in 1996, Congress clearly used the words "rate" or "charge" to refer to amounts that are paid by end-user consumers. *See*, in the original 1934 Act, 47 U.S.C. §§ 152(b), 201(b), 202, 203, 204, 205, 208, and 228. *See*, in sections enacted in the 1996 Telecommunications Act, 47 U.S.C. § 254(b)(1) and (3) and (i).

II. THE COMMISSION LACKS A FACTUAL BASIS FOR DETERMINING THAT THE PAYPHONE MARKET IS COMPETITIVE AND THAT DEREGULATION WILL RESULT IN JUST AND REASONABLE RATES

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[5]Subsection (b)(1) requires "each provider of operator services" to "withhold payment (on a location-by-location basis) of any *compensation*, including commissions, to aggregators if such provider reasonably believes that the aggregator . . . is blocking access . . . ." (emphasis added)

Assuming, notwithstanding the argument made above, that the Commission concludes that it has the authority and jurisdiction to set the retail coin rate for local calls, it also has the obligation to ensure that the rates for these calls are just, reasonable and affordable and that they are comparable between urban and rural areas. 47 U.S.C. §§ 201(b), 205, 254(b)(1) and (3). Although we agree with the Commission's theoretical premise that "once competitive market conditions exist, the most appropriate way to ensure . . . fair compensation for each call is to let the market set the price . . . ," we believe that it can be demonstrated that the payphone market is far from being competitive at this time. Unless the market for coin phone calls is competitive and the Commission makes a finding to that effect, it cannot rely on that market to ensure that coin rates are just, reasonable, affordable, and comparable between rural and urban areas.

The Commission's action is more than a matter of simple preemption of state authority. Rather, it amounts to "forbearance" as described in new section 10 of the Communications Act, 47 U.S.C. § 160. The FCC may preempt state regulation when it is inconsistent and interferes with a valid federal regulatory objective. Indeed, the payphone provision in the 1996 Act contains express authority for the Commission to preempt "State requirements [that] are inconsistent with the Commission's regulations." 47 U.S.C. § 267(c). Section 276 does more than allow preemption of inconsistent state regulations, however. It directs the FCC to regulate "compensation." Assuming pursuant to that power the Commission can directly regulate local retail coin rates (as the Commission asserted in its

Notice), the Commission decided that it will not exercise that authority. In new section 10, Congress granted the Commission express authority to forebear from exercising its statutory regulatory powers.[6] In order to forebear, however, the Commission must make three findings:

> (1) enforcement of such regulation or provision is not necessary to ensure that the *charges*, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are *just and reasonable* and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision *is not necessary for the protection of consumers*; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a). (emphasis added).

The Commission made none of these findings. Indeed, it provided no indication in ordering deregulation that it was exercising its forbearance power. As discussed below, even if it may be assumed that the Commission implicitly made some of these findings, they are not justified by the present record or by reality.

The record in this docket does not support a finding that the payphone market is workably competitive and certainly does not provide any basis for a finding that deregulated coin rates will be just, reasonable, affordable and

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[6]The provision presumably addresses the holding in *American Tel. & Tel. Co. v. F.C.C.*, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 3020, that the Commission did not have the authority to forebear from requiring non-dominant carriers to file tariffs.

comparable between urban and rural areas. Indeed, the Commission recognized that "the competitive conditions, which are a prerequisite to a deregulatory market-based approach, do not currently exist and can not be achieved immediately." Report and Order, ¶ 59. The Commission itself identified two "locational monopolies" at which "marketplace disfunctions" may exist. The first "locational monopoly" is one "caused by the size of the location with an exclusive PSP contract." Large airports are a classic example of such a location. The second "locational monopoly" is caused by "the caller's lack of time to identify potential substitute payphones." *See* Report and Order, ¶¶ 51, 59, 61. The Commission made no finding about the extent of these "market disfunctions" or, for that matter, the extent to which their converse, a competitive market, will exist by the time deregulation of the local coin rate is effective. The state commissions respectfully suggest that a properly developed record on this issue might well show that the two "locational monopolies" identified by the Commission may actually constitute virtually the whole market. To a greater or lesser extent, virtually any payphone is a "mini-monopoly," depending not only on the caller's "lack of time to identify potential substitute payphones" (a circumstance that describes most callers), but on the caller's mobility, the location of other payphones and the ease of finding them.[7]

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[7]We have attached to this petition an affidavit from Joel Fishkin, an economist with the Indiana Utility Regulatory Commission, that supports our position that the coin phone market is not currently workably competitive and is not likely to be workably competitive in the future.

Only rarely will a payphone user facing a disadvantageous local coin rate have convenient access to a competitive alternative. The lack of competitive alternatives is a particular problem in rural areas where coin phones are few and the distances between coin phones are great.[8] Furthermore, in very rural areas, the market set rate (even if the market were competitive) may not meet the just, reasonable and affordable or comparable universal standards of section 254(b)(1) and (3). For that reason, rates may have to be subsidized with section 254 funds to meet the statutory objectives and requirements. The section 276(b)(2) requirement for the establishment of public interest payphones in rural areas is meaningless if the rate for calls from those payphones resulting from deregulation and monopolistic locations is not affordable or comparable with the rate charged in urban areas. Nothing in the Report and Order indicates that the local coin rate at these payphones is exempt from deregulation.

The Commission's lack of intrastate retail rate authority also precludes its authority to impose "market-based" or any other rates for "411" and other intrastate directory assistance calls from a LEC-provided or an independent PSP. Many states, such as Maine and Maryland, have legitimate public policy reasons for not allowing either a PSP or a LEC to impose such a charge. In Maine, those reasons include when the PSP does not or cannot provide a directory at the PSP location. These states reasonably assume the PSP has and will recover its

[8]Some states like Maine still have as few as one phone per exchange.

directory assistance costs as part of its other retail rates if it does not provide a directory.

In a market that is not workably competitive, just, reasonable, affordable and subsidy-free, local coin rates cannot be determined without an examination of the cost and an allocation of coin phone costs to various classes of payphone calls. Section 276(b)(1)(B) requires the Commission to end subsidies from local exchange service and exchange access to payphones. The Commission made no finding that any such subsidy exists for any LEC in any state. The closest it comes to such a finding is its statement that "a deregulatory, market-based approach to setting local coin rates is appropriate, because existing local coin rates are *not necessarily fairly compensatory*" (Report and Order, ¶ 58). In any event, there is no record basis for making such a finding. It should not be assumed that without a factual showing that the current local coin rates allowed by state regulatory commissions are subsidized by local exchange service or exchange access. The mere suspicion by the Commission does not legally justify the Commission's preemption and certainly does not justify both preemption and deregulation. The existence of many competitive payphone providers in states that currently regulate the local coin rate lends some credence to the fact that the rates currently allowed must be compensatory. Otherwise, the competitive payphone providers would never have entered and stayed in the business in the first place. Nevertheless, the Commission has ordered a cure for a problem that may not even exist.

Rather than making the findings it must make to forebear from regulation, the Commission's Order instead places a heavy burden on the states to make a "detailed showing" that competitive markets do not exist. Moreover, states are "empowered to act by, for example, mandating that additional PSPs be allowed to provide payphones, or requiring that the PSP secure its contract through a competitive bidding process that ensures the lowest possible rate for callers." Report and Order, ¶ 61. The Commission appears to believe that state commissions have land use regulatory authority over property owners who have control over payphone placement. That, of course, is not the case, and the FCC does not have the authority to "empower" state commissions with such authority.

Deregulation of local coin rates and preemption of state regulation of the same also does not meet the requirement in section 254(i) of the Act that rates be just and reasonable. Nor does it ensure that a BOC's payphone service does not directly or indirectly subsidize its local exchange service or exchange access operations as required by section 276(a)(1). The deregulated coin rate also does not ensure fair compensation for PSPs. To the contrary, deregulated coin rates could allow some BOCs and PSPs to over-recover their costs, leading to rates that exceed both economic cost and just and reasonable levels.[9]

[9]We note that the Commission does not conclude that deregulated rates will be just and reasonable, merely that they will provide adequate compensation.

III. THE COMMISSION HAS NO AUTHORITY TO PREEMPT STATE REGULATION OF ENTRY AND EXIT TO THE PAYPHONE MARKET

The Report and Order at ¶ 50 orders the states, during a one-year review period, to conduct an "examination of payphone regulations . . . to review and remove, if necessary, those regulations that affect competition, *such as entry and exit restrictions."* (Emphasis added.) The Commission cites no statutory authority for this preemption.[10] Section 276(B)(1) states the intent of Congress "to promote competition among payphone service providers." However, "[i]n order to promote" that competition, it directs the Commission only to prescribe a specific set of regulations listed in subparagraphs (A) through (E). None of the listed subjects even conceivably address the issue of governmental regulation of entry and exit to the market.[11] Section 276(c) grants the Commission specific authority to preempt inconsistent state regulations, but only those that are inconsistent with the Commission's regulations. The preemption power contained in section 276(c) logically can only relate to regulations lawfully enacted pursuant to section 276(b).

Many of the states joining this Motion presently have little or no regulation over entry or exit. In some of those states. entry regulation amounts essentially to a registration requirement, and exit regulation is limited to notification. Nevertheless, some jurisdictions have expressed concern over the extent of the

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[10]We are unable to find any reference to this issue in the Notice. *See* discussion concerning lack of notice in Part IV below.

[11]Paragraphs D and E address an entry issue but only in connection with the BOCs' and PSPs' ability to negotiate with location providers.

Commission's purported preemption. The Public Service Commission of the District of Columbia, for example, points out that in areas within the District known for a high level of drug trafficking, there has been a proliferation of payphones. The District believes that it should have the authority to regulate entry and exit under such circumstances. *See* attached statement of the PSC for D.C.

IV. THE COMMISSION GAVE NO NOTICE THAT IT WAS CONTEMPLATING DEREGULATION

The Report and Order (¶ 57) states that the Notice of Proposed Rulemaking (¶ 21) listed three options that the Commission was considering for ensuring fair compensation for local coin calls. Those were: to set a nationwide local rate for all calls originated by payphones, for the Commission to prescribe specific national guidelines for states to use in establishing a local rate, and for the states to continue to set the local rate, subject to a possible review mechanism by the Commission. The Report and Order at ¶ 58 restated the three options, but concluded, "based on the record," that it should deregulate intrastate local coin rates.

The state commissions believe that the failure of the Commission to provide notice of the deregulation option violated the Federal Administrative Procedures Act and denied commenters due process. Commenters were not afforded an opportunity to address the merits of deregulation because they did not know that that was a possible outcome of the rulemaking. The Commission's listing of three

specific *regulatory options* surely did not send any reasonable signal that *deregulation* was a fourth option among the "range of options" which it stated was available.[12]

5 U.S.C. § 553(b)(13) requires a notice of proposed rulemaking to provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The Commission clearly provided general notice of the "subject and issue" of "ensuring fair compensation" for local coin calls. It surely did not provide notice of one critical issue: whether that fair compensation should be accomplished through deregulation. *See Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d. Cir. 1972). Accordingly, the Commission should at least reopen this proceeding in order to provide notice that one of the options it will consider is whether to deregulate local intrastate coin rates, and to afford persons the opportunity to address the lawfulness and substantive merits of that proposal.

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[12]Related to the notice problem is the reliance by the Commission at ¶ 56 on the *ex parte* letter filed by counsel for the *RBOCs* 20 days prior to the issuance of the Report and Order. Commenters should have an opportunity to evaluate and comment on evidence relied upon by an agency. *See Portland Cement Co. v. Ruckleshaus*, 486 F.2d 375 (D.C. Cir. 1973).

Similarly, the only proposal to deregulate came from a comment by the RBOCs. Report and Order, ¶ 30. While the cases are highly fact-dependent, courts have not always upheld federal agency rules that were based solely on a comment. *See Fertilizer Institute v. EPA*, 935 F.2d 1303 (D.C. Cir. 1991). Commenters are, of course, not served with copies of other comments, and the rulemaking was conducted using an extremely expedited procedure.

Respectfully submitted,

for the
MAINE PUBLIC UTILITIES COMMISSION

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Respectfully submitted

October 18, 1996

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DATED: October 18, 1996

Done and Dated this 18th day of October, 1996.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

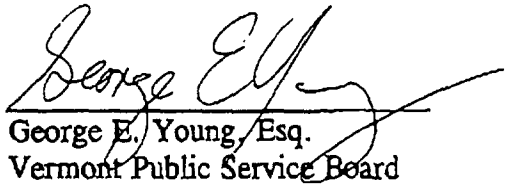
NANCY McCAFFREE, Chair

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

for the
VERMONT PUBLIC SERVICE BOARD



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